

No. 12763

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER, Co-Partners,
Doing Business as COSTNER & SEE,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS and

JOHN E. BELCHER,

Attorneys for Appellant,

1017 United States Court House

Seattle 4, Washington.

ARTHUR L. HAUGAN and

GERARD M. SHELLAN,

Attorneys for Appellee,

922 Third Avenue,

Renton, Washington.

United States District Court, Western District of
Washington, Northern Division

No. 2491

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. A. SEE and C. M. COSTNER, co-partners doing
business as COSTNER & SEE,

Defendants.

COMPLAINT

Comes now United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney for the same district, and respectfully alleges and shows.

I.

That jurisdiction of this Honorable Court is conferred by the provisions of Section 2(a) (6), Title III of the Second War Powers Act (56 Stat. 176, 50 U.S.C. App. 633), Section 7(a) and 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App., Section 1821 et seq.) and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 1345), and brings this suit for restitution of amounts due veterans of World War II for violating Section 944.54(a) Priorities Regulation 33, by the defendants herein.

II.

That defendants A. A. See and C. M. Costner are copartners, doing business as Costner & See, at Renton, King County, Washington, in the Northern Division of the Western District of Washington.

III.

That heretofore and on or about the 22nd day of May, 1946, defendants made written application to the United States Production Administration on form C.P.A. 4386, under Priorities Regulation 33, as amended, Veterans' Emergency Program for the construction of two five-room dwellings, including garages, on Tract 9, Highland Addition to the town of Renton, to be sold to veterans of World War II at the maximum sales price per complete unit, including land, of \$6750 each, furnishing at said time outline specifications (form HH 1012) to the Federal Housing Administration, which application was granted August 26, 1946, by the Federal Housing Administration, and Priority No. 88-127-0333 assigned thereto.

IV.

That thereafter and on September 9, 1946, defendant A. A. See, acknowledged in writing addressed to the Federal Housing Administration, receipt of such priority authorization, and thereafter and on September 16, 1946, said construction was inspected by and at that stage approved by the Federal Housing Administration Inspector.

V.

That on the 11th day of February, 1947, an agent of the defendants entered into an agreement in writing with one Lovell S. Sherin, a veteran qualified to purchase, and his wife Edna Marie Sherin, by the terms of which, subject to the approval of the owners, the defendants herein, the said Lovell S. Sherin paid to said agent the sum of One Hundred Dollars, earnest money, and defendants agreed to sell, and the said Lovell S. Sherin agreed to buy one of the dwellings herein mentioned, for the sum of Eight Thousand Five Hundred (\$8,500.00) Dollars, said dwelling being located on the following described real property, to-wit:

“North 45 feet of the So. 90 feet of Tract 9,
Highland Addition to the Town of Renton * *”

the terms being One Thousand (\$1000.00) Dollars down payment, (including One Hundred (\$100.00) Dollars earnest money).

“Balance, Seven Thousand, Five Hundred (\$7,500.00) Dollars, subject to approval of G.I. loan; seller to complete construction of house in accordance with terms list on reverse side hereof.” On the reverse side of said earnest money receipt is endorsed the following:

“Seller to complete garage, build walkways, and front and back entrance to sidewalk. Furnish shades for entire house, furnish light fixtures for entire house. Build a rockery in the front of the house and place oil tanks under-

ground. Backfill to be graded to level with top of basement stairwell. Repair basement and waterproof same. Build small overhead porch over front steps.”

That defendant herein approved said sale by affixing their respective signatures to said earnest money receipt, well knowing at said time that the maximum price they could lawfully charge and receive for said property was the sum of Six Thousand, Seven Hundred Fifty (\$6750.00) Dollars.

VI.

That thereafter, through the Renton Branch Peoples National Bank of Washington, a G.I. loan in the sum of Seven Thousand, Five Hundred (\$7500.00) Dollars was negotiated by the said Lovell S. Sherin, being V.A. Loan No. 1015, and said sum, together with One Thousand, Forty-six (\$1046.00) Dollars, furnished by the said Sherin, was paid over to Wallin & Edwards, as agents for defendants caused to be delivered to the said Sherin a statutory warranty deed to the premises herein described, which was duly recorded in the office of the Auditor of King County, Washington, under auditor's fee No. 3679578, dated March 27, 1947, and recorded in Vol. 2614 Deeds, page 492, and a mortgage on said premises was executed by the said Sherin and wife for the sum of Seven Thousand, Five Hundred (\$7500.00) Dollars.

VII.

That said sale so consummated was in violation of the maximum sale price fixed by Federal Housing

Authority and Priority Regulation 33, in that said sale price so charged and collected by defendant exceeded the maximum sale price so fixed by the sum of One Thousand, Seven Hundred and Fifty (\$1,750.00) Dollars, in which sum plaintiff seeks restitution for the benefit of said veteran.

And for a Second Cause of Action

I.

Plaintiff hereby adopts paragraphs I, II, III and IV of its first cause of action, and makes the same a part hereof by reference and without repetition.

II.

That on the 27th day of February, 1947, an agent of defendants entered into an agreement in writing with Robert W. Collins, a veteran of World War II, qualified to purchase, and Maxine A. Collins, his wife, by the terms of which, subject to the approval of the owners, the defendants herein, the said Collins paid said agent the sum of One Hundred (\$100) Dollars, and defendants agreed to sell and the said Robert W. Collins and wife agreed to buy one of the dwellings herein mentioned, for the sum of Eight Thousand, Five Hundred (\$8500.00) Dollars, said dwelling being located on the following described real property, to-wit:

“South 45’ of Tract 9 of Highland Addition to the Town of Renton.”

the terms being One Thousand (\$1000.00) Dollars down (including One Hundred Dollars earnest money), “balance of \$7500.00 subject to G.I. loan.

Also subject to the sale of purchasers' property at 12523-112th S.E., Windsor Hills."

That defendants herein approved said sale by affixing their signatures thereto, well knowing at said time that the maximum price they could lawfully charge and receive for said property was the sum of Six Thousand, Seven Hundred Fifty Dollars.

III.

That thereafter, a G.I. loan was negotiated and the purchase closed through Wallin Edwards, Inc., Renton, Washington, and defendants caused to be delivered to the said Robert W. Collins and wife a statutory warranty deed to the premises herein described, which was duly recorded in the office of the Auditor of King County, Washington, under Auditor's Fee No. 3704977, in Vol. 264 Deeds, at page 433, and a mortgage was executed by said Collins and wife in the amount of Seven Thousand, Five Hundred (\$7500.00) Dollars.

IV.

That said sale so consummated was in violation of the maximum sales price fixed by Federal Housing Authority and Priority Regulation 33, in that said sales price, so charged and collected by defendants, exceeded the maximum sales price so fixed by the sum of One Thousand, Seven Hundred Fifty (\$1750.00) Dollars, in which sum plaintiff seeks restitution for the benefit of said veteran.

Wherefore, plaintiff prays the judgment and decree of this honorable Court as follows:

1. On its first cause of action herein for the benefit of Lovell S. Sherin, restitution in the sum of One Thousand, Seven Hundred Fifty (\$1750.00) Dollars.

2. On its second cause of action herein for the benefit of R. W. Collins, restitution in the sum of One Thousand, Seven Hundred Fifty (\$1750.00) Dollars.

3. Besides its costs and disbursements herein expended, and such other and further equitable relief as to the Court seems meet and proper.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed March 16, 1950.

Defendant's Motion for Dismissal is at page 12a

[Title of District Court and Cause.]

NOTICE OF ARGUMENT

To the above-named defendants and Arthur L. Haugan and Thomas Keefe, their attorneys, 922-3d Ave., Renton, Wash.

You, and each of you, will please take notice that your motion for dismissal in the above-entitled cause will be brought on for argument before the Hon. John C. Bowen, 6th Floor, United States Court House, Seattle, on Monday, August 14, 1950, at 10:00

a.m., or as soon thereafter as counsel can be heard.

Dated this 10th day of August, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed August 10, 1950.

United States District Court Western District of
Washington, Northern Division
No. 2491

UNITED STATES OF AMERICA,
Plaintiffs,
vs.

A. A. SEE and C. M. COSTNER, co-partners doing
business as COSTNER & SEE,
Defendants.

ORDER GRANTING MOTION
FOR DISMISSAL

This cause came regularly on for hearing before the undersigned Judge in the above-entitled Court on the 30th day of August, 1950, pursuant to continuance from August 28, 1950, upon the Motion for Dismissal filed herein by the Defendants; the Plaintiff appearing and being represented by John E. Belcher, Assistant United States Attorney; the Defendants appearing and being represented by their counsel of record, Arthur L. Haugan; the Court having heard argument of counsel for the respective

parties and having considered the written memoranda of authorities filed by the respective parties, and the Court having considered the matter and being fully advised in the premises and the law; now therefore

It Is Hereby Ordered, Adjudged and Decreed that Defendants' motion for dismissal filed herein should be and the same is hereby granted; and the above-entitled action and all causes of action therein set forth be and the same are hereby dismissed.

To all of which Plaintiff excepts, and exception is allowed.

Done In Open Court this 12th day of September, 1950.

/s/ PEIRSON M. HALL,
District Judge.

Presented By:

/s/ ARTHUR L. HAUGAN,
Of Counsel for Defendants.

Approved as to Form and Notice of Presentation
Waived:

/s/ J. CHARLES DENNIS,
United States Attorney.

By /s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed and entered September 12,
1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered herein on the 12th day of September, 1950.

Dated this 10th day of November, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause.]

MOTION FOR DISMISSAL

Come now the Defendants and respectfully move the Court for an Order dismissing the above entitled action and each separate cause of action therein, on the following grounds:

(1) That the Complaint and each separate cause of action therein fails to state sufficient facts to constitute a cause of action against Defendants.

(2) That the Court does not have jurisdiction of this action or the subject matter.

(3) That the Plaintiff is not entitled to the relief prayed for nor entitled under the law to maintain said action.

(4) That this action and each separate cause of action therein, being for the benefit of private individuals therein named, is barred by the applicable Statute of Limitations and has not been brought within the time limited by law; which appears from the allegations of the Complaint.

This Motion is based upon the files and records herein and is made pursuant to rule XII, Federal Rules of Procedure.

/s/ ARTHUR L. HAUGAN,
ARTHUR L. HAUGAN &
THOMAS KEEFE,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1950.

Procedure, I am transmitting herewith all the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the order granting motion for dismissal filed and entered September 12, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed March 16, 1950.
2. Praecipe for the Process, filed March 16, 1950.
3. Marshal's Return on Summons, filed March 31, 1950.
- 3(a). Appearance of Defense, filed April 3, 1950.
4. Motion of Defendants for Dismissal, filed July 19, 1950.
5. Plaintiff's Motion for Motion Calendar on Motion for Dismissal, filed August 10, 1950.
6. Plaintiff's Memorandum filed August 10, 1950.
- 6(a). Defendants' Memorandum of Authorities on Motion to Dismiss, filed August 28, 1950.
7. Defendants' Supplemental Memorandum on Motion to Dismiss, filed August 31, 1950.
8. Order granting Motion for Dismissal, filed and entered September 12, 1950.
9. Plaintiff's Notice of Appeal filed November 10, 1950.

10. Plaintiff's Designation of Record on Appeal, filed November 14, 1950.

11. Plaintiff's Statement of Points Relied Upon on Appeal, filed November 14, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees, and charges incurred in my office for preparation of the record on appeal in this cause, to-wit:

Plaintiff's Notice of Appeal.....\$5.00

In Witness Whereof, I have hereto set my hand and affixed the Official Seal of said District Court at Seattle, this 6th day of December, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12763. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. A. A. See and C. M. Costner, co-partners, doing business as Costner & See, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 8, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12763

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER, co-partners, doing
business as COSTNER & SEE,
Defendants.

STATEMENT OF POINTS

I.

Appellant, United States of America, hereby adopts the statement of points relied upon on appeal heretofore filed with the Clerk of the District Court for the Western District of Washington, Northern Division, as follows:

1. That the District Court erred in granting defendants' motion to dismiss and entering an order of dismissal because:

(a) The court has jurisdiction of both the parties and the subject matter.

(b) The complaint states a cause of action entitling the plaintiff to the relief prayed for.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed January 15, 1951.